90-814

No. ——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

ASHLEY ELLIOTT,
Petitioner,

v.

MERCURY MARINE, a Division of Brunswick Corporation,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Where the United States Court of Appeals for the Eleventh Circuit set aside a jury verdict solely on the basis of its view of unsettled issues of Alabama state law, and where the Supreme Court of Alabama has consented to answer questions presenting those identical issues as certified to the state court by the United States District Court for the District of Alabama, do fundamental fairness and the well-established principles of comity and cooperative judicial federalism necessitate that this Court vacate the Eleventh Circuit's decision and remand for reconsideration in light of the Supreme Court of Alabama's answer to the certified questions?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Ashley Elliott respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered in the above-entitled proceeding.[1]

OPINION BELOW

The opinion of the Court of Appeals for the Eleventh Circuit, entered on June 25, 1990, is reported at 903 F.2d 1505, and is reprinted in the Appendix to this petition at 1a.

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[1] The parties to the proceeding below were petitioner and Brunswick Corporation, which appeared through its division, Mercury Marine.

JURISDICTION

This suit was tried in the United States District Court for the Northern District of Alabama pursuant to that court's diversity jurisdiction, 28 U.S.C. Sec. 1332. The court entered judgment for petitioner, pursuant to the jury's verdict, on January 17, 1989. *See* p. 14a, *infra.*

On appeal, the Eleventh Circuit invoked its jurisdiction under 28 U.S.C. Sec. 1291 and 1294 and reversed in a judgment and opinion entered on June 25, 1990. *See* p. 1a, *infra.* The Eleventh Circuit denied a timely petition for rehearing en banc and refused to certify unsettled and dispositive questions of state law to the Alabama Supreme Court on August 24, 1990. *See* p. 12a, *infra.* Jurisdiction is conferred on this Court by 28 U.S.C. Sec. 1254(1).

PROVISION INVOLVED

Rule 18(a) of the Alabama Rules of Appellate Procedure provides:

> "*When Certified.* When it shall appear to a court of the United States that there are involved in any proceeding before it questions or propositions of law of this state which are determinative of said cause and that there are no clear controlling precedents in the decisions of the supreme court of this state, such federal court may certify such questions or propositions of law of this state to the supreme court of Alabama for instructions concerning such questions or propositions of state law, which certified questions the supreme court of this state, by written opinion, may answer.

STATEMENT OF THE CASE

Introduction

In this diversity action, after removal from a state court that had found petitioner's claims cognizable under state law, and after the federal District Court had up-

held a jury verdict for petitioner under state law, the Eleventh Circuit resolved the dispositive questions of state law differently, and then refused to certify those questions to the Supreme Court of Alabama. The Supreme Court of Alabama has now agreed to resolve those unsettled questions of state law upon certification from a federal District Court in another case raising "identical" issues, and is likely to decide the questions differently from the way they were decided by the Eleventh Circuit. If this occurs, it would be fundamentally unfair and contrary to principles of comity and cooperative judicial federalism to treat petitioner differently than all other litigants with respect to those state law issues. Accordingly, the Court should grant certiorari, vacate, and direct the Eleventh Circuit to reconsider its determination of those state law issues once the Alabama Supreme Court has ruled,[2] or, alternatively, the Court should hold this petition for consideration after the Supreme Court of Alabama has ruled.

Facts

On July 24, 1982, Ashley Elliott ("Elliott"), then fourteen years old, was struck by the sharp metal blades of a rotating propeller when she jumped into water and was run over by a motor boat travelling at 5 m.p.h. The boat involved was a "planing" pleasure craft.[3] As a result of the incident, Elliott suffered grievous injuries requiring extensive surgery.[4]

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[2] The Eleventh Circuit could also certify the questions presented in this case to the Supreme Court of Alabama and ask that they be consolidated with the previously certified questions.

[3] "Planing" means that as these boats increase speed, they lift out of the water and "plane" on the surface.

[4] Elliott sustained three deep gashes to the bone in her buttock area and one in her calf. One of these cuts was so deep it severed the sciatic nerve, causing paralysis below the knee. Another neces-

Elliott filed suit in Alabama state court on July 22, 1983, against Sportcraft, Inc. ("Sportcraft"), the manufacturer of the boat that struck her; Mercury Marine,[5] the manufacturer of the boat's motor, including the drive mechanism requiring a propeller; and several others. All defendants except Mercury and Sportcraft settled with petitioner prior to trial. The state court overruled motions to dismiss filed by Mercury and Sportcraft. In July 1988, Mercury and Sportcraft removed the case to the United States District Court for the Northern District of Alabama. The case was tried in August 1988. The jury failed to reach a verdict as to Mercury, and the District Court declared a mistrial.[6]

In January 1989, the case was retried in the District Court. Elliott contended that the marine engine manufactured by Mercury was defective under the Alabama Extended Manufacturers Liability Doctrine ("AEMLD") for failure to incorporate a propeller guard into its design, and alternatively that Mercury was negligent or wanton in failing to design, manufacture and market its product with a propeller guard. Elliott alleged that this defective design enhanced her injuries. During the trial the jury heard evidence, including expert testimony, from both parties regarding the feasibility of boat engine propeller guards. At the close of evidence, the District Court denied Mercury's motion for a directed verdict. The court instructed the jury on three state law theories of recovery: (1) compensatory damages based

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sitated a colostomy. Elliott had to undergo nine surgical procedures. She still is partially crippled, with disfiguring scarring.

[5] Respondent Mercury Marine is a division of Brunswick Corporation ("Brunswick"). Before the case went to trial, Brunswick was substituted for Mercury Marine in plaintiff's complaint. After the jury verdict was entered in favor of Elliott, Brunswick appealed solely in the name of Mercury Marine. Both companies will be referred to collectively as "Mercury."

[6] The jury entered a verdict in favor of Sportcraft.

on alleged negligence, (2) compensatory damages based on alleged product liability under AEMLD, and (3) punitive damages based on alleged wantonness. After considering the evidence in light of the court's instructions, the jury returned a verdict in favor of Elliott in the amount of $1.5 million compensatory damages and $3.0 million punitive damages. The District Court reduced the amount of the verdict by the sums Elliott had received in settlement from other defendants, and entered a judgment against Mercury in the amount of $4,375,000.00. *See* p. 14a, *infra.*[7]

Mercury appealed, raising numerous issues. The Eleventh Circuit reversed, addressing only one issue: the court ruled, as a matter of law, that Elliott failed to establish Mercury's liability under either AEMLD product liability or Alabama negligence law, and therefore Mercury's motion for directed verdict should have been granted. The Eleventh Circuit concluded that both of Elliott's theories of liability apply "[v]irtually the same principles" with regard to an allegedly defective design. 903 F.2d at 1506; 4a. In the court's view, both theories require Elliott to demonstrate (1) "'that the product does not meet the reasonable expectations of an ordinary consumer as to its safety,'" *id.* at 1507; 4a (quoting *Casrell v. Altec Indus., Inc.*, 335 So.2d 128, 133 (Ala. 1976)), and (2) that a "'safer, practical, alternative design was available to the manufacturer at the time it manufactured the [product],'" *id.* (quoting *General Motors Corp. v. Edwards*, 482 So.2d 1176, 1191 (Ala. 1985)). The court held that Elliott had failed to establish either element of her two causes of action, and thus had not presented a *prima facie* case under the AEMLD or Alabama negligence law. *Id.*; 5a.

The Eleventh Circuit labeled the first element the "consumer expectation test." The court acknowledged that,

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[7] The District Court subsequently denied Mercury's Motion for Judgment Notwithstanding the Verdict or in the Alternative for Remittitur, or in the Alternative for a New Trial.

under Alabama law, "a jury ordinarily evaluates a plaintiff's claim that a product is defective." 903 F.2d at 1507; 5a. Nevertheless, the court ruled that Elliott's claim that Mercury's boat engine was defectively designed should *not* have gone to the jury. The basis for this conclusion was the court's finding that "certain products whose inherent danger is patent and obvious, do not, *as a matter of law*, involve defects of a sort that a jury should resolve." *Id.* (emphasis added). In support of this view of Alabama law, the court cited two cases that involved claims by intended users that the product was defective for its failure to warn of potential dangers when used; whereas this case involves alleged defects in a product's design that foreseeably enhanced injuries to a third party, not the user of the product. *See id.* (citing *Entrekin v. Atlantic Richfield Co.*, 519 So.2d 447, 450 (Ala. 1988), and *Hawkins v. Montgomery Indus. Int'l, Inc.*, 536 So.2d 922, 926 (Ala. 1988)). Without looking to any analogous Alabama caselaw, and relying (without explanation) only on a 1971 Georgia intermediate appellate case, the Eleventh Circuit then held "that the dangers inherent in Mercury's product should have been apparent to, or within the contemplation of, Elliott"—despite the fact that she was not the intended user of the product—and therefore, as a matter of law, "Mercury has not manufactured a defective product." 903 F.2d at 1507; 6a (citing *Stovall & Co. v. Tate*, 124 Ga.App. 605, 184 S.E.2d 834, 838 (1971)).

In the second portion of its decision, the Eleventh Circuit held that Elliott "failed to produce evidence that Mercury had access to a safe, practical design for propeller guards at the time of her accident" and therefore failed to establish liability under state AEMLD or negligence theories. 903 F.2d at 1509; 10a. The court cited *no* Alabama case law in support of its conclusion. Relying instead (without explanation) on an Oregon case, the court stated that in order to submit design-defect allegations to the jury, it is not enough to show the

"technical feasibility of a safe design"; there must also be evidence from which the jury could find that the suggested alternative is "practicable in terms of costs and the over-all design and operation of the project." *Id.* at 1510; 10a (quoting *Wilson v. Piper Aircraft Corp.*, 282 Or. 61, 577 P.2d 1322, 1326-1327 (1978)). In the court's view, Elliott had failed to make this latter showing because the Eleventh Circuit's assessment of the evidence was that propeller guards could not yet be marketed for general use, that propeller guards presented some problems, and that a satisfactory guard was not available. *Id.* at 1509; 11a.[8] The Eleventh Circuit found that "an experimental propeller guard, useful for some purposes, existed at the time of [Elliott's] accident," but refused to "hold Mercury for its failure to adapt and refine that design into one feasible for use on planing propeller craft." 903 F.2d at 1508; 6a.[9] Accordingly, the court held that Elliott's claims should not have gone to the jury.

In her petition for rehearing en banc and to certify questions to the Alabama Supreme Court, Elliott argued that the panel had misinterpreted Alabama law. Elliott urged the Eleventh Circuit to utilize the certification procedures of Rule 18 of the Alabama Rules of Appellate Procedure, and to ask the Supreme Court of Alabama to determine the dispositive issues of state law upon

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[8] The Eleventh Circuit based these conclusions on *its* view of four aspects of the testimony of both parties' experts. 903 F.2d at 1509; 10a. As we will show *infra*, it is likely the Supreme Court of Alabama would view these conclusions as irrelevant because Alabama law only requires a showing that an alternative design is technically and economically feasible, not that alternative designs have been marketed for general use.

[9] Acknowledging that "it was possible to equip these boats with guards," 903 F.2d at 1509; 9a, the Eleventh Circuit noted that rescue units in parts of California, as well as in New Zealand and Australia, use propeller guards; moreover, the United States Marine Corps landing craft at one time used guards. *Id.* at 1508 n.2; 7a n.2.

which the panel had ruled. The Eleventh Circuit denied Elliot's petition, without opinion, on August 24, 1990. *See* p. 14a, *infra*.

Shortly thereafter, on September 19, 1990, the same District Court judge who had upheld the jury verdict in Elliott's lawsuit certified five questions of Alabama law to the Supreme Court of Alabama in another lawsuit presenting precisely the same legal issues as this case. *See Beech v. Outboard Marine Corp.*, Civil Action No. 89-AR-0789-M, Certificate from the United States District Court for the Northern District of Alabama to the Supreme Court of Alabama Pursuant to Rule 18, Alabama Rules of Appellate Procedure (Sept. 19, 1990); 19a.[10]

The plaintiff in *Beech* was run over and severely injured while swimming near a boat powered by an outboard motor manufactured by defendant Outboard Marine Corporation ("OMC"). Plaintiff, through his father, sued OMC alleging that the OMC engine was defective because OMC failed to incorporate a propeller guard. In moving for summary judgment in *Beech*, OMC argued that the issues of Alabama law controlling that case are indistinguishable from the issues ruled upon by the Eleventh Circuit in this case. The District Court agreed. Indeed, the court remarked that "[i]t is so highly unusual as to amount to a miracle that this court is now confronted with the identical issues of Alabama law recently presented to it in *Elliott*." *Beech v. Outboard Marine Corp.*, Civil Action No. 89-AR-0789-M, Memorandum Opinion at 3-4 (N.D. Ga., Sept. 19, 1990); 17a. The District Court noted, as did the Eleventh Circuit, that *General Motors Corp. v. Edwards*, *supra*, was the most relevant state law decision. The District Court concluded, however, that *Edwards* was not clearly controlling. The court ruled that "there exist questions or propositions of

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[10] The questions were drafted by the District Court judge, not by either party. *See* p. 18a, *infra*.

law which are determinative of this cause and that there are no clear controlling precedents of the Supreme Court of Alabama on the said questions or propositions." *Id.* at 2; 16a. Because the District Court could see "no legitimate, factual or legal distinction between *Elliott* and [*Beech*]," [11] the court "deem[ed] it appropriate that the highest appellate court in the state of Alabama, the state whose substantive laws are necessarily to be applied, be given an opportunity to express itself before [the District Court] expresses itself." *Id.* at 4; 18a.[12]

On October 9, 1990, OMC petitioned the Eleventh Circuit for a writ of mandamus, pursuant to Rule 21 of the Federal Rules of Appellate Procedure, to direct the District Court (Hon. William M. Acker, Jr.) to withdraw its order in *Beech* certifying questions to the Supreme Court of Alabama. OMC again argued that because the case against OMC in *Beech* is identical to this case (it involves the same claims, the same legal issues, the same technical issues, and the same expert witnesses), it must be controlled by the Eleventh Circuit's decision in this case.

On October 11, 1990, the Supreme Court of Alabama consented to answer the questions certified by the District Court in *Beech*. *Beech v. Outboard Marine Corp.*, No. 89-1815, Order (Oct. 11, 1990); 23a. The Supreme Court stated the certified questions as follows:

> "1. Assuming that several witnesses for plaintiff and several witnesses for defendant, all having the threshold credentials and qualifications to be allowed to express opinions as experts on water safety and/or

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[11] The court noted, in paritcular, that the expert witnesses in *Beech* will either be identical to those who testified in *Elliott*, or will be making the same technical and bio-mechanical arguments. *Id.* at 4; 18a.

[12] Accordingly, the court decided to keep OMC's motion for summary judgment under advisement until the Supreme Court of Alabama either answered the certified questions or declined to accept certification. *Id.*

boat propeller design and/or the feasibility of designing a guard for a boat propeller, express differing opinions as to the feasibility and desirability of designing and marketing a propeller guard for pleasure craft which, while arguably creating other dangers, would, in fact, have protected a swimmer under certain circumstances against certain kinds of propeller injuries, can a swimmer injured under such circumstances by an unguarded propeller present a prima facie case under the Alabama Extended Manufactures Liability Doctrine (AEMLD); or is the trial court precluded from submitting to the jury the question of whether or not a safer practical alternative design could have been or should have been made available to the consuming public?"

"2. Is is possible under AEMLD for an injured swimmer to present expert testimony which will make out a jury issue of product defect when the only alleged defect is the absence of a guard on a pleasure boat propeller on an outboard motor and when the only evidence offered by plaintiff is that a feasible propeller guard *could have been* designed by a proper use of the manufacturer's resources?"

"3. As a matter of Alabama law, is or is not a pleasure boat's unguarded propeller dangerous beyond the expectation of an ordinary consumer?"

"4. Assuming that several witnesses for plaintiff and several witnesses for defendant, all having the threshold credentials and qualifications to be allowed to express opinions as experts on water safety and/or boat propeller design and/or the feasibility of designing a guard for a boat propeller, express differing opinions as to the feasibility and desirability of designing and marketing a propeller guard for pleasure craft which, while arguably creating other dangers, would, in fact, have protected a swimmer under certain circumstances against certain kinds of propeller injuries, can a swimmer injured under such circumstances by an unguarded propeller present a prima facie case under a negligence theory, or is the

court precluded from submitting to the jury the question of whether or not the failure to provide such a propeller guard constitutes negligence?"

"5. Assuming that several witnesses for plaintiff and several witnesses for defendant, all having the threshold credentials and qualifications to be allowed to express opinions as experts on water safety and/or boat propeller design and/or the feasibility of designing a guard for a boat propeller, express differing opinions as to the feasibility and desirability of designing and marketing a propeller guard for pleasure craft which, while arguably creating other dangers, would, in fact, have protected a swimmer under certain circumstances against certain kinds of propeller injuries, can a swimmer injured under such circumstances by an unguarded propeller present a prima facie case under a wantonness theory, or is the court precluded from submitting to the jury the question of whether or not the failure to provide such a propeller guard constitutes wantonness?"

On October 29, 1990, the Eleventh Circuit denied OMC's petition for writ of mandamus. *In re: Outboard Marine Corp.*, No. 90-7686, Order (11th Cir., Oct. 29, 1990), p. 26a, *infra.*[13]

After briefing on the five certified questions, the Supreme Court of Alabama will be poised to answer those questions. *See* p. 23a, *infra.*[14]

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[13] Before the Eleventh Circuit ruled on OMC's petition, the Supreme Court of Alabama granted OMC's motion to stay the certification proceeding in light of OMC's petition for writ of mandamus. After the Eleventh Circuit denied the petition, OMC petitioned for rehearing, and that petition is still pending. In deference to the federal court, the Supreme Court of Alabama has not yet lifted its stay.

[14] Beech served his opening brief on October 26, 1990.

REASONS FOR GRANTING THE WRIT

I. FUNDAMENTAL FAIRNESS AND THE PRINCIPLES OF COMITY AND COOPERATIVE JUDICIAL FEDERALISM COUNSEL THAT THE ELEVENTH CIRCUIT'S DECISION BE VACATED AND, IF NECESSARY, CORRECTED ONCE THE SUPREME COURT OF ALABAMA HAS AUTHORITATIVELY SPOKEN ON THE CONTROLLING ISSUES OF ALABAMA LAW.

The unresolved issues of Alabama law currently pending before the Supreme Court of Alabama are identical to the dispositive state law issues the Eleventh Circuit decided below. It is possible—even likely—that the Supreme Court of Alabama will resolve those state law issues differently from the way they were decided by the Eleventh Circuit. If this occurs, fundamental fairness and well-established principles of comity and cooperative federalism would necessitate that the Eleventh Circuit's erroneous interpretation of state law be corrected so that identically situated parties (Elliott and Beech) be treated the same.

Pursuant to the *Erie* Doctrine, a federal court sitting in diversity must apply the substantive law of the State in which it sits. *See Erie v. Tompkins*, 304 U.S. 64 (1938). The Eleventh Circuit was therefore obligated to apply Alabama law in reviewing the judgment sustaining Elliott's AEMLD and negligence claims against Mercury. The parties vigorously argued the relevant legal issues, pursuant to Alabama precedents. In both aspects of its decision, however, the Eleventh Circuit travelled into uncharted waters. Alabama law has not addressed the issue of whether a jury is barred from considering whether an unguarded boat propeller meets the reasonable expectations of an ordinary consumer as to its safety. Nor has Alabama law addressed whether a jury can consider whether a manufacturer should have used a safer product when safer product designs were technically and economi-

cally feasible, even if they were not generally marketed. In both regards, the Eleventh Circuit's decision stands as the first, and only, pronouncement of Alabama law.

But only two months after the Eleventh Circuit refused to certify the questions, the Supreme Court of Alabama agreed to decide the very same unresolved issues of state law. The Supreme Court of Alabama is, of course, "the final expositor[] of [Alabama] state law" and of state policies that underlie it. *England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411, 415 (1964). Once that court has spoken on the issues, all other courts, including the Eleventh Circuit, must follow its judgment. *See, e.g., Exxon Corp. v. Eagerton*, 462 U.S. 176, 181 n.3 (1983); *Commissioner v. Estate of Bosch*, 387 U.S. 456, 463 (1967); *Commercial Union Ins. Co. v. Bituminous Cas. Corp.*, 851 F.2d 98, 100 (3d Cir. 1988).[15] Thus, if the Supreme Court of Alabama disagrees with the Eleventh Circuit—and it most likely will, as discussed *infra*—Elliott will be in the anomalous position of being the only litigant penalized by the Eleventh Circuit's incorrect statement of Alabama law.[16]

The inequity of this result is heightened by the fact that Elliott originally brought her suit in *state* court, which ruled that her claims *were* cognizable under Alabama law. The defendants moved to dismiss the state court action, claiming that Elliott had not stated an AELMD or negligence cause of action. The Alabama

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[15] *See also* 19 C. Wright, A. Miller, E. Cooper, Federal Practice and Procedure § 4507 at 91-92 & nn. 31 & 32 (1982 & Supp. 1990) (citing cases) (hereafter "Wright & Miller").

[16] In analogous circumstances, this Court has granted certiorari to ensure that identically situated parties are treated equally. *Gondeck v. Pan Am. World Airways, Inc.*, 382 U.S. 25 (1962) (*per curiam*). In fact, in *Gondeck*, the Court granted certiorari "in the interests of justice" even though it had previously denied certiorari in the same case. *Id.* at 27. It did so because a subsequent decision resulted in the petitioner "stand[ing] completely alone" in his erroneous treatment under the controlling law. *Id.*

trial court denied those motions. Thus, that state court, at least, believed that Elliott had, as a matter of Alabama law, stated a valid claim against Mercury. Had respondent not removed the case to federal court, the Alabama state courts would have continued to rule on the Alabama state law issues presented in this case and vigorously argued by the parties.[17] And Elliott would have had the benefit of the state court's correct, authoritative pronouncement of state law, rather than the Eleventh Circuit's inaccurate projection. The *Erie* Doctrine is premised on the principle that "the rights of the litigant should not depend upon the accident of diversity of citizenship." Corbin, The Laws of the Several States, 50 Yale L.J. 762, 774 (1941). Yet this may be exactly Elliot's plight unless this Court vacates the Eleventh Circuit's decision and directs the Eleventh Circuit to reconsider respondent's appeal in light of the Supreme Court of Alabama's definitive statements of controlling Alabama law.

Vacating the Eleventh Circuit's decision and remanding for that court's reconsideration after the Supreme Court of Alabama rules in *Beech*, so that the federal court can be correctly informed by the state court's authoritaitve judgment, would give life to "the important considerations of comity and cooperative federalism which are inherent in [our] federal system." *Lehman Bros. v. Schein*, 416 U.S. 386, 393-394 (1974) (Rehnquist, J., concurring). Indeed, it is the desire to "build a cooperative judicial federalism," *id.* at 392, which has led this Court to embrace whole-heartedly the certification process adopted by many States, including Alabama. *See, e.g.*,

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[17] Indeed, had the Eleventh Circuit certified the unresolved questions to the Supreme Court of Alabama, as Elliott requested, the present inequitable situation would not have arisen. The Eleventh Circuit has not hesitated to employ the Supreme Court of Alabama's certification procedure in other cases. *See, e.g., Integrity Ins. Co. v. King Kutter, Inc.*, 866 F.2d 408 (11th Cir. 1989); *Scott v. Board of Trustees*, 815 F.2d 653 (11th Cir. 1987); *Washburn v. Rebun*, 755 F.2d 1404 (11th Cir. 1985).

Zant v. Stephens, 456 U.S. 410, 416 (1982); *Elinks v. Moreno*, 435 U.S. 647, 668-669 (1978); *Bellotti v. Baird*, 428 U.S. 132, 151-152 (1976). Unnecessarily allowing the Eleventh Circuit to create and apply a rule of state law that conflicts with the law established by the highest court of the State "offend[s] the comity due to local courts." *Santiago-Hodge v. Parke Davis & Co.*, 859 F.2d 1026, 1033 (1st Cir. 1988) (certifying unsettled question to Supreme Court of Puerto Rico).[18]

Awaiting the ruling of the Supreme Court of Alabama would not be a futile gesture. It is very likely that the state court will provide answers to the certified questions that directly conflict with the conclusions the Eleventh Circuit reached below. The Supreme Court of Alabama's ruling in *Beech* is almost certain to demonstrate that the Eleventh Circuit was wrong in reversing, on state law grounds, the jury verdict and judgment in favor of Elliott.

First, the Eleventh Circuit departed from accepted federal practice in ascertaining the relevant Alabama law.[19]

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[18] "[R]eal injustice is done to the litigants and, worse, more damage is done to the states' jurisprudence and its policies by a headstrong, resolute, inflexible determination on the part of a federal court to barge ahead in a sort of ascetic, misguided impulse, than will likely result from the slight delay occasioned by invoking state adjudication of the controlling issues. For the simple fact is that more and more, more federal courts are being overruled by more state courts on local issues upon which such federal courts have undertaken to read the *Erie* signs in the quest of the *Winter Haven* grail."

United States v. Buras, 475 F.2d 1370, 1373-1374 n.5 (10th Cir. 1972) (Brown, C.J., dissenting from denial of petition for rehearing en banc) (internal quotations, citations, and footnotes omitted), *cert. denied*, 414 U.S. 865 (1973).

[19] It is remarkable that the Eleventh Circuit was so sanguine about reversing the District Court on the issues of state law, for it is generally accepted that such decisions are accorded considerable deference on appeal on the understanding that the District Court judge has greater familiarity with the law of the State in

In applying state law in diversity suits, the federal court "functions as a proxy for the entire state court system and therefore must apply the law that it conscienciously believes would have been applied in the state court system." 19 Wright & Miller § 4507 at 89. The proper function of a federal court in diversity "is to ascertain what the state law is, not what it ought to be." *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 497 (1941). In the absence of controlling state law, the federal court is not free to indulge its preferences as to how the common law should develop, but must determine how the highest state court would decide the issue. *E.g., Towne Realty, Inc. v. Safeco Ins. Co. of America*, 854 F.2d 1264, 1268-1269 (11th Cir. 1988); *United Parcel Serv., Inc. v. Weben Indus., Inc.*, 974 F.2d 1005, 1008 (5th Cir. 1986).[20] In making that judgment, the federal court must look to decisions by the state supreme court in analogous cases, and to decisions of lower courts in that State. Decisions of courts of other States and other federal courts may provide some insight, *if the state supreme court would have looked to those decisions in formulating its substantive law.* Other legal sources, such as treatises and law review commentaries may also be helpful. *See, e.g., Nicolson v. Life Ins. Co. of Southwest*, 783 F.2d 1316, 1319 (1986); *McKenna v. Ortho Pharmaceutical Corp.*, 622 F.2d 657, 662-663 (3d Cir.), *cert. denied*, 449 U.S. 976 (1980); *Socony-Vacuum Oil Co. v. Continental Cas. Co.*, 219 F.2d 645, 647 (2d Cir. 1955). *See generally* 19 Wright & Miller § 4507 at 91-103.

In concluding that, under Alabama law, an unguarded boat propeller is not dangerous beyond the reasonable expectations of an ordinary consumer, the Eleventh Circuit cited *no* Alabama authority. *See* 903 F.2d at 1507;

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which he sits. *See, e.g., Balliache v. Fru-Con Const. Corp.*, 866 F.2d 798, 799 (8th Cir. 1989); *Hines v. Joy Mfg. Co.*, 850 F.2d 1146, 1150 (6th Cir. 1988).

[20] *See* 19 Wright & Miller § 4507 at 103 & n.55 (citing cases).

5a.[21] Instead, the federal court quoted dicta from an intermediate Georgia state court regarding a manufacturer's liability for injuries caused by an axe, buzz saw or airplane's exposed propeller. *Id.*; 6a (quoting *Stovall & Company v. Tate, supra*). The court never discussed any evidence suggesting that the Supreme Court of Alabama would find the almost twenty-year-old dicta of an

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[21] The Eleventh Circuit did purport to rely on Supreme Court of Alabama cases in determining the relevant legal standard for analyzing this question, but the cases it cited in support of an "open and dangerous" defense are not on point and may not be applicable in the context of this case. See 903 F.2d at 1507; 5a. *Entrekin v. Atlantic Richfield Co., supra*, was a failure-to-warn case, and one of the alleged defects in *Hawkins v. Montgomery Indus. Int'l, Inc., supra*, was also a failure to provide adequate warnings. The courts held, simply, that "there is no duty to warn where the danger is obvious." *Hawkins*, 536 So.2d at 927 (Steagal, J., on application for rehearing). *Accord Entrekin*, 519 So.2d at 450 ("A warning is to inform the user of a danger of which he is not aware.") This is not a failure-to-warn case; the alleged defect is one of design. The manufacturer could not be expected to have warned Elliott of the dangerousness of the unguarded propeller since she did not use the product.

This highlights the major difference between the cases cited by the Eleventh Circuit and this case: the plaintiff in both *Entrekin* and *Hawkins* was the *ultimate consumer* of the allegedly defective product. In both cases, the courts found, *on the specific facts of the case*, that the product's dangerousness was contemplated by the consumer when he purchased (or used) the product, and therefore *he* could not recover for injuries caused when the product was used. This is a kind of assumption of risk or contributory negligence. *See, e.g., Rowden v. Tomlinson*, 538 So.2d 15 (Ala. 1988) (contributory negligence); *Wallace v. Doege*, 484 So.2d 404, 406 (Ala. 1986) (same); *Rivers v. Stihl, Inc.*, 434 So.2d 766, 773 (Ala. 1983) (assumption of risk). Elliott, on the other hand, cannot fit into this mold; she was not the intended user of the product; she was not a "consumer" at all. She was an innocent bystander when the product was used. Although Elliott was a foreseeable victim (from the manufacturer's perspective), she cannot be charged with responsibility for foreseeing that she might be run over by a motor boat that has exposed steel propellers that are exceedingly dangerous.

intermediate appellate level court of another State persuasive.[22]

With regard to the second ground for its decision—the availability of a safer alternative design—the Eleventh Circuit relied on no Alabama cases whatsoever. Instead, the court adopted legal standards articulated by a *federal* court applying *Mississippi* law [23] and the Supreme Court of Oregon applying *Oregon* law,[24] without ever suggesting any basis for believing that these isolated decisions—both of which are over ten years old—would have persuasive effect in the Supreme Court of Alabama or that Alabama takes the same doctrinal approach as those other States. In short, contrary to this Court's instruction in *Klaxon, supra*, instead of attempting to ascertain what Alabama law "is," the Eleventh Circuit apparently sought only to determine "what it ought to be."

The Supreme Court of Alabama is unlikely to agree with the Eleventh Circuit's view of Alabama law.[25] The Supreme Court of Alabama is likely to answer the third certified question by holding that, as a matter of Alabama law, a pleasure boat's unguarded propeller is dangerous beyond the expectation of an ordinary consumer

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[22] As an earlier panel of the Eleventh Circuit acknowledged, "Georgia's product liability law . . . is significantly different from Alabama's product liability law." *Nettles v. Electrolux Motor AB*, 784 F.2d 1574, 1578 (11th Cir. 1986).

[23] *See* 903 F.2d at 1509; 10a (citing *Fincher v. Ford Motor Co.*, 399 F. Supp. 106, 114 (S.D. Miss. 1975), *aff'd*, 535 F.2d 657 (5th Cir. 1976).

[24] *See* 903 F.2d at 1510; 10a-11a (citing *Wilson v. Piper Aircraft Corp.*, 282 Or. 61, 577 P.2d 1322 (1978)).

[25] As then-Justice Rehnquist has explained, "the certification procedure is more likely to produce the correct determination of state law" than the federal court's endeavor to ascertain it. *Lehman Bros. v. Schein*, 416 U.S. at 395 (concurring opinion).

(or at least that the issue should go to the jury).[26] This result is likely because the Supreme Court of Alabama has rejected an "open and obvious danger" complete defense, *Beliot Corp. v. Harrell*, 339 So.2d 992, 997 (Ala. 1976), and has held that questions of the obviousness of the defect are for the jury in AEMLD cases, *Caterpillar Tractor Co. v. Ford*, 406 So.2d 854, 856-857 (Ala. 1981) (failure to equip tractor with roll bar). Indeed, another panel of the Eleventh Circuit has cited *Caterpillar* and other Supreme Court of Alabama cases and expressly held that "[u]nder the AEMLD, . . . a product may be found defective even if the danger is open and obvious." *Nettles v. Electrolux Motor AB*, 784 F.2d 1574, 1579 (11th Cir. 1986).[27]

Moreover, in *General Motors Corp. v. Edwards*, *supra* —the Alabama case most analogous to this case—the Supreme Court defined "reasonable expectations of an ordinary consumer" in a crashworthiness case in terms of a comparison between the allegedly defective product and "a safer, practical, alternative design [that] was available to the manufacturer at the time it manufactured the [product]." 482 So.2d at 1191. And in *Casrell v. Altec Industries, Inc.*, 335 So.2d at 131, the Supreme Court quoted the following language from *Balido v. Improved Machinery Inc.*, 29 Cal. App. 3d 633 (1973):

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[26] Under Alabama law, "the jury must be allowed to pass on the evidence if any, no matter how slight, is offered, which, if believed, would support a verdict in favor of the party against whom a directed verdict is sought." *Entrekin v. Atlantic Richfield Co.*, 519 So.2d at 450 (internal quotes omitted).

[27] No Alabama court has ever suggested that this pronouncement of Alabama law is erroneous. *Compare, e.g., United States v. Buras*, 475 F.2d at 1373-1374 n.5 (Brown, C.J., dissenting from denial of petition for rehearing en banc) (enumerating state court decisions explicitly rejecting federal court readings of pertinent state law).

The panel decision, in this case does not distinguish, or even mention, *Nettles*.

> "A manufacturer's failure to achieve its full potential in design and thereby forestall unreasonable danger forms the basis for its strict liability in tort. It is a liability whose essence parallels the lack of due care that is the essence of its liability for negligence. It may be seen, therefore, that in cases involving deficient design, foreseeability is merely scienter under another name."

In sum, based on Supreme Court of Alabama precedents, it appears that, under Alabama law, the fact that an ordinary consumer may understand that a revolving propeller involves danger does not preclude a finding that a marine engine product is defective where it can be shown that a safer, practical, alternative design was available to the manufacturer at the time it manufactured the product in question. This is particularly true in cases such as this, where the plaintiff is not the "consumer" of the allegedly defective product, and therefore cannot be charged with "contemplation" of its dangerousness in the same sense as the intended user.

The second ground for the Eleventh Circuit's reversal is subsumed in Certified Questions 1, 2 and 4. The Supreme Court of Alabama is likely to answer these questions by holding, in effect, that "practical, alternative design" does not mean only a design that is already being marketed, or is immediately capable of being marketed, by manufacturers. Rather, *prima facie* showing of a practical, alternative design, sufficient to support a claim of defect under the AEMLD or negligence, is established where the plaintiff submits some proof that the alternative design was technologically and economically feasible within the guidelines established by the Supreme Court of Alabama in *General Motors Corp. v. Edwards*, *supra*. In *Casrell v. Altec Indus., Inc.*, for example, the Supreme Court explained that defectiveness " 'must be determined by the *potential* available to the designer at the time of design.' " 335 So.2d at 131 (quoting *Balido v. Improved Machinery, Inc.*, *supra*) (emphasis added).

Later, in *Dunn v. Wixom Bros.*, 493 So.2d 1356, 1359 (Ala. 1986), the Supreme Court of Alabama adopted the holding of *The T.J. Hooper*, 60 F.2d 737 (2d Cir.), *cert. denied*, 287 U.S. 662 (1932), where Judge Learned Hand stated:

> "A whole calling may have unduly lagged in the adoption of new and available devices. It never may set its own test, however persuasive be its usages. Courts must in the end say what is required; there are precautions so imperative that even their universal disregard will not excuse their omission."

60 F.2d at 740. Thus, the Alabama court has registered its opinion that the absence of a safer product on the market would not, *per se*, preclude a finding of liability under Alabama law.[28] Once the plaintiff presents some evidence that it was technologically and economically possible for the manufacturer to use a safer design, even if that design has some problems, it is the jury's task to decide whether the design was "feasible" and whether the manufacturer unreasonably chose not to utilize it. *Cf. General Motors Corp. v. Edwards*, 482 So.2d at 1198 ("[J]uries . . . are charged with the awesome responsibility of deciding, on a case by case basis, the reasonableness of an automobile's design.").

Under principles of fundamental fairness, comity and cooperative federalism, this Court should ensure that Elliott not be unnecessarily penalized for the Eleventh Circuit's incorrect pronouncement on Alabama law, if, as expected, the Supreme Court of Alabama decides these dispositive state law questions as petitioner has urged.

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[28] This reasoning is particularly appropriate in this case, where the evidence at trial showed that respondent and OMC, the defendant in *Beech*, controls 85% of the market and therefore could ensure that a guarded propeller was never generally available. *See also Caterpillar Tractor Co. v. Ford*, 406 So.2d at 858 (absence of a federal standard does not excuse defendant's failure to guard where product was otherwise unreasonably dangerous).

Absent this Court's action, petitioner may be denied a jury verdict to which she is rightfully entitled under state law, even though petitioner at every stage did everything possible to argue the state law issues, including requesting that the court below certify the unsettled state law issues to the Supreme Court of Alabama. The Court need do little to avoid this wrong: the Eleventh Circuit can itself correct its decision once it is provided the necessary guidance by the Supreme Court of Alabama.[29]

CONCLUSION

For the foregoing reasons, the Court should grant the petition for certiorari, vacate the Eleventh Circuit's decision below and direct the court to reconsider its decision once the Supreme Court of Alabama has answered the state law questions certified in *Beech v. Outboard Marine Corp.*, No. 89-1815. Alternatively, the Court should defer consideration of the petition for certiorari pending the Supreme Court of Alabama's decision in *Beech*, and, if the Supreme Court of Alabama rules differently than the Eleventh Circuit, thereafter grant the petition, vacate the Eleventh Circuit's decision, and remand for reconsideration.

Respectfully submitted,

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[29] This procedure should not inconvenience the court. If the Supreme Court of Alabama agrees with the Eleventh Circuit's view of Alabama law, the federal court can simply reinstate its judgment. Respondent is not prejudiced because there is no outstanding verdict against it; Mercury is not required to do anything.

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November 21, 1990

APPENDICES

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 89-7190

ASHLEY ELLIOTT,
Plaintiff-Appellee,

v.

BRUNSWICK CORPORATION,
Defendant.

APPEAL OF MERCURY MARINE, A DIVISION OF BRUNSWICK CORPORATION,
Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Alabama

June 25, 1990

Before COX, Circuit Judge, and HILL*, Senior Circuit Judge, and SMITH**, Senior Circuit Judge.

HILL, Senior Circuit Judge:

The appellant, a manufacturer of motors for boats, appeals an unfavorable judgment of $4,375,000.00 in this lawsuit based on diversity jurisdiction. At trial, the appellee contended that the appellant should have constructed guards on the propellers that it manufactures, and asserted three theories of recovery: (1) compensa-

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* *See* Rule 34-2(b), Rules of the U.S. Court of Appeals for the Eleventh Circuit.

** Honorable Edward S. Smith, Senior U.S. Circuit Judge for the Federal Circuit sitting by designation.

tory damages based on alleged negligence, (2) compensatory damages based on alleged product liability under the Alabama Extended Manufacturer's Liability Doctrine, and (3) punitive damages based on alleged wantonness. The jury returned a verdict in favor of the appellee against Mercury in the amount of $1,500,000.00 compensatory damages, and $3,000,000.00 punitive damages. The district court entered a judgment against Mercury in the amount of $4,375,000.00, a sum which reflected a setoff for the amount the appellee received in settlement from other defendants. We reverse.

FACTS

In July, 1982, the appellee, Ashley Elliott, then fourteen years old, jumped from a pier at night into the water next to a boat; the rotating propeller on the boat's motor, and perhaps the boat's cavitation plate, struck and injured her. Elliott suffered grievous injuries requiring extensive surgery. The appellant, Mercury Marine, designed and manufactured the motor at issue, including the drive mechanism which required a propeller. Consumers generally use boats such as the one involved here, (of the sort often referred to as "planing" pleasure crafts [1]), for skiing, fishing and other recreational activities. At trial, the evidence showed that the boat operator had been drinking, but his conduct is not at issue in this appeal.

TRIAL PROCEEDINGS

In July, 1983, Elliott filed suit in the Circuit Court of Jefferson County, Alabama against Mercury and several other defendants; most defendants settled with Elliott prior to trial. Elliott contended that Mercury should have constructed a guard around the boat's propeller to protect her from injury. In July, 1988, Mercury and a

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[1] "Planing" means that as these boats increase in speed (up to 20 m.ph.), they lift themselves from the water and "plane" on the surface.

co-defendant removed this diversity case to the United States District Court for the Northern District of Alabama. The parties tried the case in August, 1988, but after two days of deliberation, the jury failed to reach a verdict as to Mercury, and the court declared a mistrial.

In January, 1989, the parties retried the case, and the court instructed the jury on three theories of recovery: (1) compensatory damages based on alleged negligence, (2) compensatory damages based on alleged product liability under the Alabama Extended Manufacturer's Liability Doctrine ("AEMLD"), and (3) punitive damages based on alleged wantonness. The jury returned a verdict, and the court entered a judgment for the amount we have already discussed.

Mercury filed a Motion for Judgment Notwithstanding the Verdict or in the Alternative for Remittitur or in the Alternative for a New Trial, which the court denied. This appeal followed.

DISCUSSION

Mercury now asserts that the district court erred in denying Mercury's motion for both a directed verdict and a judgment notwithstanding the verdict as to the issue of Mercury's liability; Mercury also asserts that the district court erred in denying this same motion on the issue of the punitive damages assessed against Mercury. Mercury also challenges the district court's admission into evidence of a videotape deposition of one of Mercury's attorneys who repeatedly invoked the attorney-client privilege and refused to answer. Likewise, Mercury contends that the district court erred by denying its motion for a new trial, and by allowing the admission of evidence concerning Mercury's wealth. Finally, Mercury asks in the alternative that we enter a remittitur as to the amount of punitive damages that the district court assessed.

MERCURY'S LIABILITY

The trial court charged the jury in this case on two liability theories, product liability under the Alabama Extended Manufacturer's Liability Doctrine ("AEMLD"), and negligence. Case law, found in *Casrell v. Altec Industries, Inc.*, 335 So.2d 128 (Ala. 1976), and *Atkins v. American Motors Corp.*, 335 So.2d 134 (Ala.1976), created Alabama's AEMLD. Virtually the same principles apply under either theory.

In *Casrell* and *Atkins*, Alabama, like many states, partially adopted Section 402A of the American Law Institute's Second Restatement of Torts. That Section banished the traditional obstacles of both privity and contractual defenses to product liability claims by changing the nature of the cause of action from contract to tort. Plaintiffs, moreover, no longer needed to prove the seller's lack of due care, since the new action, although based in tort, removed the requirement that the product's defect result from the seller's negligence. Advocates and scholars have divided the new tort into many subparts, but the instant case clearly involves, not an alleged manufacturing flaw, but a manufacturer's alleged conscious decision to design an inherently dangerous product.

With this qualification in mind, we now examine the pertinent Alabama case law. Elliott contends that Mercury's design for its propeller was defective, since it did not provide for a guard to encircle it. In *Casrell*, the Supreme Court of Alabama interpreted "defective" to mean ". . . that the product does not meet the reasonable expectations of an ordinary consumer as to its safety." 335 So.2d at 133. In *General Motors Corp. v. Edwards*, 482 So.2d 1176, 1191 (Ala.1985), that same court held that if a plaintiff wishes to show that an allegedly dangerous product is defective, he must also prove that a ". . . safer, practical, alternative design was available to the manufacturer at the time it manufactured the [prod-

uct]." Mercury contends that Elliott failed to establish either element of her cause of action. We agree.

1. *Consumer Expectations Test*

As adopted by the Alabama Supreme Court in *Atkins v. American Motor Corp.*, 335 So.2d 134, 147 (Ala.1976), the Second Restatement states that a defective product is one ". . . dangerous beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics." Restatement (Second) of Torts, § 402A comment i. Our task today is to determine whether a pleasure boat's unguarded propellers are dangerous beyond the expectations of the ordinary consumer. We conclude that they are not.

Although, under Alabama law, a jury ordinarily evaluates a plaintiff's claims that a product is defective, our review of the pertinent case law convinces us that certain products whose inherent danger is patent and obvious, do not, as a matter of law, involve defects of a sort that a jury should resolve.

In our view, the ordinary consumer clearly understands that a revolving propeller involves danger. "The use of certain products," as the Alabama Supreme Court has noted, has always been ". . . firmly grounded in common sense." *Entrekin v. Atlantic Richfield Co.*, 519 So.2d 447, 450 (Ala. 1988). In *Hawkins v. Montgomery Industries Int'l, Inc.*, 536 So.2d 922, 926 (Ala.1988), moreover, that same court held that although a jury must normally assess a plaintiff's allegations that a product is defective, an "exception[]" exists when the involved parties "contemplated" the nature of the defect at the time of the accident.

Some products, by their nature, (or, in modern parlance, by their conscious design), place both users and bystanders in some measure of danger. A knife or an axe may cut persons, as well as their intended targets. Fish

hooks can wound; saws can maim, and revolving propellers can cause fearful damage. Yet as the Georgia Court of Appeals noted in *Stovall & Co. v. Tate*, 124 Ga. App. 605, 184 S.E.2d 834, 838 (1971), we do not hold manufacturers liable simply because the use of their products involves some risk:

> To illustrate, the manufacturer who makes, properly and free of defects, an axe or a buzz saw or an airplane with an exposed propeller, is not to be held liable if one using the axe or the buzz saw is cut by it, or if someone working around the airplane comes in contact with the propeller.

We hold that the dangers inherent in Mercury's product should have been apparent to, or within the contemplation of, Elliott. Thus, Mercury has not manufactured a defective product within the meaning of the Restatement (Second) of Torts.

2. *Available Alternative Design*

Elliott vigorously contends that Mercury had access to a safe, practical design for propeller guards "which it could have manufactured and marketed many years in advance of the manufacture of the engine involved in this lawsuit." Mercury just as vigorously contends that Elliott is unfairly attempting to penalize the company by creating an imaginary duty "to invent" an acceptable propeller guard.

We agree with Mercury that courts cannot burden companies with an immediate duty to revolutionize their industry. Elliott has demonstrated to our satisfaction than an experimental propeller guard, useful for some purposes, existed at the time of her accident. Elliott also argues, however, that we should hold Mercury for its failure to adapt and refine that design into one feasible for use on planing propeller craft. With this we do not agree.

As Mercury has stated, and as Elliott concedes, at this stage neither industry custom, nor the pertinent regula-

tions, dictate the use of propeller guards. Witnesses for both parties indicated that no boat manufacturer, boat motor manufacturer, or boating accessory manufacturer currently offers a propeller guard for planing pleasure boats for the purpose of protecting persons from propeller contact.[2] Moreover, the Federal Boat Safety Act of 1971, 46 U.S.C.A. § 4301, *et seq.*, gives the Coast Guard the exclusive responsibility for establishing safety regulations. The Coast Guard, in its turn, has promulgated a substantial body of boat safety regulations, none of which require or recommend propeller guards.[3]

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[2] Certain rescue units in parts of California, as well as in New Zealand and Australia, apparently use propeller guards for life rescue operations conducted in high surf; at one time certain United States Marine Corps landing craft also used them there. Both life rescue boats and military landing craft, will, of course, probably be either stationary or slow-moving, since they generally operate in situations where floundering persons may be in the water, near the revolving propeller blades.

In addition, slow-moving passenger boats in amusement parks also use propeller guards. Finally, one propeller manufacturer uses guards to protect the propellers on low-horsepower motors on non-planing fishing boats, since users often take these boats into shallow water containing underwater hazards such as rocks and stumps.

[3] We also note that the *Report of the Propeller Guard Committee*, prepared by the National Boating Safety Advisory Committee, and presented on November 7, 1989, recommends that the "U.S. Coast Guard . . . take *no* regulatory action to require propeller guards" (emphasis supplied). The Report reflects the concerns of several of the experts at trial by noting that these "guards present underwater profiles of significantly larger frontal area," thereby increasing the risk of accidental contact with persons in the water. The Report also warns that ring-type guards may catch an arm, leg or other appendage and hold it against the blades of the rotating propeller.

Although the Coast Guard has considered the matter, it has not adopted regulations requiring guards.

We suggest, although we in no way hold, that when the federal government has explicitly declared that its rules and regulations supplant those of a state, a party may at least contend that these regulations supplant pronouncements not only from state

Eliott argues, however, and we agree, that a manufacturer's proof of compliance with either industry-wide practices, or even federal regulations, fails to eliminate conclusively its liability for its design of allegedly defective, products. *See e.g., Dunn v. Wixom Bros.*, 493 So.2d 1356 (Ala.1986); *General Motors Corp. v. Edwards*, 482 So.2d 1176, 1198 (Ala.1985). We do not, naturally, dismiss a manufacturer's compliance with industry standards, but we must also remember that those standards may sometimes merely reflect an industry's laxness, inefficiency, or inattention to innovation. As Judge Learned Hand stated in *The T.J. Hooper*, 60 F.2d 737, 740 (2d Cir.1932):

> A whole calling may have unduly lagged in the adoption of new and available devices. It never may set its own test, however persuasive be its usages. Courts must in the end say what is required; there are precautions so imperative that even their universal disregard will not excuse their omission.

In our view, it is difficult to articulate a rule that categorizes, in consistent fashion, those occasions when a court should defer to a manufacturer's compliance with industry standards, and those occasions when a court should fashion new guidelines as to what those standards should be. In *this* case, however, we have the opinion of experts to guide us.

At trial, the plaintiff showed the jury a videotape of the boat actually involved in Elliott's accident, with a ring guard affixed to its propeller, and demonstrating a loss in speed of only five miles per hour. At first blush, this demonstration, the highwater mark of the plaintiff's case, was most impressive. On reflection, however, we note that the plaintiff demonstrated only what both parties

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legislatures, but from state juries as well. We caution, however, that this suggestion in no way determines our holding today.

already had conceded; both parties agreed that it was possible to equip these boats with guards.[4]

At trial, moreover, the experts called by *both* parties agreed that no feasible guard existed that could be adapted readily to existing motors. For example, one of plaintiff's witnesses, Dr. Arthur Reed, a naval architect, estimated that Mercury might develop an appropriate guard after a total of ten or eleven years of effort by biomechanical engineers, hydrodynamic engineers, structural engineers, and materials engineers, followed by an additional four years of prototype testing. Dr. Reed frankly conceded, in short, that, in his view, "all of these guards need technical development before they are ready to really be marketed."

Both parties' witnesses, moreover, testified regarding potential difficulties that these devices might engender. Both groups of experts, for example, testified that the use of these guards can result in a boat's substantial loss of power and speed, due to their added drag. Both parties' experts also testified that ring guards would create handling and steering problems; they stated that these guards, due to their circular shape, add new rudder areas in entirely new planes, thus inducing dangerous handling characteristics. Mercury's experts, moreover, testified that guards could create safety hazards. They stated that some consumers would be likely to remove the guard to gain power and promote fuel economy; a guard's removal would cause the boat to exceed its power rating, and thus would create handling difficulties.

Both parties' experts also explained that guards themselves can become a danger as they move through the water. Experts from both sides agreed that guards can

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[4] In fact, had the jurors been able to join the operator *inside* the boat, instead of merely witnessing a videotaped demonstration of his ride, they might have gained greater insight into some of the difficulties generated by the application of these guards.

entrap human limbs, increasing the risks of mutilation, amputation and drowning. One of Elliott's experts acknowledged that if a boat were moving in the 30-35 mph range, a blow to the head by one of its guards would be fatal; he also conceded that serious injuries would occur even at lesser speeds.

In short, although Elliott's experts promoted the use of propeller guards, they agreed that companies could not yet market them for general use. Both sets of experts, moreover, discussed the problems that these devices engender. Elliott's nearest approach to evidence on their utility was her videotape of the boat that struck her equipped with such a guard; Elliott's own experts, however, agreed that a satisfactory guard of this type was not available. Elliott, therefore, failed to produce evidence that Mercury had access to a safe, practical design for propeller guards at the time of her accident.

We do not mean to suggest, by our holding today, that the propeller industry may never design a feasible propeller guard that satisfies the concern mentioned by the experts at trial. Our review of the evidence and testimony, however, convinces us that both current industry standards, and the federal regulations, simply reflect the consensus of experts that the industry's adaption of propeller guards at this point would not only be infeasible, but unwise, unsafe and unfortunate. As a general rule, courts endeavor not to scapegoat manufacturers where challenged designs are "in a state of flux" at the time of manufacture. *Fincer v. Ford Motor Co.*, 399 F.Supp. 106, 114 (S.D.Miss.1975), *aff'd*, 535 F.2d 657 (5th Cir.1976). In this case, moreover, the challenged designs are not even in a state of transition; at trial, even experts who promoted these guards agreed that their application was not yet possible. As one court reasoned in *Wilson v. Piper Aircraft Corp.*, 282 Or. 61, 577 P.2d 1322, 1326-27 (1978):

> If liability for the alleged design defect is to "stop somewhere short of the freakish and the fantastic," plaintiff's *prima facie* case of a defect must show more than technical feasibility of a safe design.
>
> * * * *
>
> It is not proper to submit such allegations to the jury unless the court is satisfied that there is evidence from which the jury could find the suggested alternatives are not only technically feasible but also practicable in terms of costs and the over-all design and operation of the project.

Experts have studied this issue, and have stated that no company has as yet developed a feasible guard; they have also expressed serious concerns about its safety. We hold, therefore, that when Elliott failed to demonstrate the existence of a safer, practical propeller guard for use on planing pleasure boats, as required by the Alabama Supreme Court in *Ewards*, she failed to establish a claim under Alabama's Extended Manufacturer's Liability Doctrine. We also hold, for the same reason, that Elliott failed to state a tort claim based on negligence.

CONCLUSION

Because of our holding on the subject of Mercury's liability, we need not reach the other issues raised in its appeal.

We hold that the appellee failed to show that the appellant manufactured a product defective in the sense contemplated by the Restatement (Second) of Torts, § 402A, and as interpreted by the Alabama Supreme Court.

We therefore REVERSE the judgment of the district court.

APPENDIX B

THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 89-7190

ASHLEY ELLIOTT,
Plaintiff-Appellee,
versus
BRUNSWICK CORPORATION,
Defendant,
MERCURY MARINE, a Division of
Brunswick Corporation,
Defendant-Appellant

On Appeal from the United States District Court
for the District of Northern Alabama

ON PETITION FOR REHEARING AND SUGGESTION OF REHEARING EN BANC

Opinion June 25, 1990

Before: COX, Circuit Judge, HILL*, Senior Circuit Judge, and SMITH**, Senior Circuit Judge

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* See Rule 34-2(b), Rules of the U.S. Court of Appeals for the 11th Cir.

** Honorable Edward S. Smith, Senior U.S. Circuit Judge for the Federal Circuit, sitting by designation.

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion of Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Emmett Ripley Cox
United States Circuit Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action No. 88-AR-1104-S

ASHLEY ELLIOTT,
Plaintiff

vs.

BRUNSWICK CORPORATION,
Defendant

ORDER

Pursuant to the jury verdict of this date, plaintiff, Ashley Elliott, shall have and recover of defendant, Brunswick Corporation, the sum of $4,375,000.00 representing the verdict in the amount of $4,500,000.00 minus the $125,000.00 previously received by *pro tanto* settlement. Judgment in said amount is hereby ENTERED.

Court costs are taxed against defendant.

DONE this 17th day of January, 1989.

/s/ William M. Acker, Jr.
WILLIAM M. ACKER, JR.
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
MIDDLE DIVISION

Civil Action No. 89-AR-0789-M

MATTHEW BEECH, ETC.,
Plaintiff

VS.

OUTBOARD MARINE CORPORATION,
Defendant

MEMORANDUM OPINION

[Filed Sep. 19, 1990]

The court has for consideration the motion for summary judgment pursuant to Rule 56, F.R.Civ.P., filed by defendant, Outboard Marine Corporation (OMC), in the above-entitled cause. The plaintiff is Matthew Beech, an eight-year old minor who sues through his next friend and father, Thomas L. Beech. The action is based on allegations that plaintiff was run over and injured while swimming with his father near a boat powered by an 88 horsepower Johnson outboard motor manufactured by OMC.

In its brief in support of its Rule 56 motion, OMC alleges, correctly:

> Plaintiff's entire case is based upon his claim that the OMC engine was defective in one respect: it did not have a propeller guard. That is the only allegation of defect against OMC.

OMC argues that the issues of Alabama law are indistinguishable from the issues presented in *Elliott v. Brunswick Corporation*, 903 F.2d 1505 (11th Cir. 1990). Both parties agree that the Alabama case which comes closest to the point is *General Motors Corp. v. Edwards*, 482 So. 2d 1176 (Ala. 1985), which was relied upon by the Eleventh Circuit in *Elliott*. However, it appears to this court pursuant to Rule 18, Alabama Rules of Appellate Procedure, that there exist questions or propositions of law which are determinative of this cause and that there are no clear controlling procedents of the Supreme Court of Alabama on the said questions or propositions.

Elliott was a diversity action in which the question of liability was governed by the Alabama substantive law of (1) Alabama Extended Manufacturers Liability Doctrine; (2) negligence; and (3) wantonness. In *Elliott*, the Eleventh Circuit reversed the judgment entered by the district court on a jury verdict in favor of a swimmer injured by an unguarded propeller manufactured, designed and marketed by the defendant in that case. The Eleventh Circuit gave two basic reasons for its finding or interpretation of the applicable Alabama law: (1) that the plaintiff had not proven that a safer, practical alternative design was available to the manufacturer-defendant; and (2) that a pleasure boat's unguarded propeller is not dangerous beyond the expectation of an ordinary consumer. West Publishing Company's key numbered propositions of law preceding its publication of *Elliott*, both under the heading "Products Liability," are:

> Pleasure boat's unguarded propellers are not "dangerous beyond expectations of ordinary consumer" so as to render propeller defective within meaning of Alabama products liability law.
>
> * * * *

> Failure of pleasure boat motor manufacturer to design safe, practical propeller guard for pleasure boat motors did not render propeller unreasonably dangerous under Alabama products liability law, where neither industry custom, nor pertinent regulations, dictated use of propeller guards.

The Eleventh Circuit stated these propositions of Alabama law which led to its conclusion that defendant's motion for a directed verdict should have been granted. The *Elliott* case was submitted to a jury which, in theory if not in fact, evaluated the considerable expert testimony offered by plaintiff, all to the general effect that a propeller guard could have been adapted and made feasible for use on a pleasure craft such as the one which injured plaintiff while she was swimming. Plaintiff's theory was not that a feasible propeller guard presently existed but that a feasible guard could have been developed and been available by a reasonable use of the manufacturer's resources. Theoretically at least, the jury believed the plaintiff's experts. The central question on appeal to the Eleventh Circuit was "Could plaintiff's experts be believed?" The Eleventh Circuit concluded that "the consensus of the experts [is] that the industry's adoption of propeller guards at this point would not only be infeasible, but unwise, unsafe and unfortunate." This was not only the Eleventh Circuit's interpretation of the opinions of the experts in that case but was an expression by the Eleventh Circuit of the law of Alabama on this rather narrow subject.

Is is so highly unusual as to amount to a miracle that this court is now confronted with the identical issues of Alabama law recently presented to it in *Elliott*. The easier course would be to grant OMC's motion for summary judgment on the precedent of *Elliott*. But plaintiff in the instant case, while unsuccessfully attempting to distinguish this case from *Elliott*, has also asked this court to certify to the Supreme Court of Alabama certain

pertinent questions pursuant to Rule 18, Alabama Rules of Appellate Procedure. Because this court can see no legitimate, factual or legal distinction between *Elliott* and this case, questions, as composed by this court and not by plaintiff's counsel, will be certified. In particular, the expert witnesses in this case and in *Elliott* will either be identical, or will be making the same technical and bio-mechanical arguments. Under the circumstances, this court deems it appropriate that the highest appellate court in the State of Alabama, the state whose substantive laws are necessarily to be applied, be given an opportunity to express itself before this court expresses itself. Therefore, by separate order, this court will certify certain questions to the Supreme Court of Alabama.

This court will keep OMC's motion for summary judgment under advisement until the Supreme Court of Alabama either answers the certified questions or declines to accept the certification.

DONE this 19th day of September, 1990.

/s/ William M. Acker, Jr.
WILLIAM M. ACKER, JR.
United States District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
MIDDLE DIVISION

Civil Action No. 89-AR-0789-M

MATTHEW BEECH, ETC.,
Plaintiff

vs.

OUTBOARD MARINE CORPORATION,
Defendant

CERTIFICATE FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA TO THE SUPREME COURT OF ALABAMA PURSUANT TO RULE 18, ALABAMA RULES OF APPELLATE PROCEDURE

[Filed Sep. 19, 1990]

(1) *Style of the Case*:

The style of the case in which this certificate is made is Matthew Beech, an eight-year old minor who sues through his next friend and father, Thomas L. Beech, Plaintiff, v. Outboard Marine Corporation, a corporation, Defendant, Civil Action No. 89-AR-0789-M, United States District Court for the Northern District of Alabama, Middle Division.

(2) *Statement of Facts*:

The pertinent facts are set forth in the accompanying memorandum opinion, and are elaborated in defendant's

motion for summary judgment and in plaintiff's response, both of which will be transmitted herewith to the Supreme Court of Alabama.

(3) *Questions Certified*:

A. Assuming that several witnesses for plaintiff and several witnesses for defendant, all having the threshhold credentials and qualifications to be allowed to express opinions as experts on water safety and/or boat propeller design and/or the feasibility of designing a guard for a boat propeller, express differing opinions as to the feasibility and desirability of designing and marketing a propeller guard for pleasure craft which, while arguably creating other dangers, would, in fact, have protected a swimmer under certain circumstances against certain kinds of propeller injuries, can a swimmer injured under such circumstances by an unguarded propeller present a prima facie case under the Alabama Extended Manufacturers Liability Doctrine (AEMLD); or is the trial court precluded from submitting to the jury the question of whether or not a safer practical alternative design could have been or should have been made available to the consuming public?

B. Is it possible under AEMLD for an injured swimmer to present expert testimony which will make out a jury issue of product defect when the only alleged defect is the absence of a guard on a pleasure boat propeller on an outboard motor and when the only evidence offered by plaintiff is that a feasible propeller guard *could have been* designed by a proper use of the manufacturer's resources?

C. As a matter of Alabama law, is or is not a pleasure boat's unguarded propeller dangerous beyond the expectation of an ordinary consumer?

D. Assuming that several witnesses for plaintiff and several witnesses for defendant, all having the threshold

credentials and qualifications to be allowed to express opinions as experts on water safety and/or boat propeller design and/or the feasibility of designing a guard for a boat propeller, express differing opinions as to the feasibility and desirability of designing and marketing a propeller guard for pleasure craft which, while arguably creating other dangers, would, in fact, have protected a swimmer under certain circumstances against certain kinds of propeller injuries, can a swimmer injured under such circumstances by an unguarded propeller present a prima facie case under a negligence theory, or is the court precluded from submitting to the jury the question of whether or not the failure to provide such a propeller guard constitutes negligence?

E. Assuming that several witnesses for plaintiff and several witnesses for defendant, all having the threshhold credentials and qualifications to be allowed to express opinions as experts on water safety and/or boat propeller design and/or the feasibility of designing a guard for a boat propeller, express differing opinions as to the feasibility and desirability of designing and marketing a propeller guard for pleasure craft which, while arguably creating other dangers, would, in fact, have protected a swimmer under certain circumstances against certain kinds of propeller injuries, can a swimmer injured under such circumstances by an unguarded propeller present a prima facie case under a wantonness theory, or is the court precluded from submitting to the jury the question of whether or not the failure to provide such a propeller guard constitutes wantonness?

All of these questions presuppose that substantial evidence of proximate causation is presented by the plaintiff.

The particular phrasing used in the above certified questions is not intended in any way to restrict the Supreme Court's consideration of the issues or its analysis of the record certified in this case. This latitude, of

course, extends to the Supreme Court's restatement of the issue or issues and to the manner in which it gives its answers. *See Martinez v. Rodriquez*, 394 F.2d 156, 159, n.6 (5th Cir. 1968). If the Supreme Court requests of the Clerk of this court that the transcript of the entire record in *Elliott v. Brunswick Corporation* be made available, the Clerk shall transmit it.

The Clerk of this Court is directed to transmit this certificate, as well as a copy of the entire file in the case, including the accompanying memorandum opinion, to the Supreme Court of Alabama, all under the official seal of the Clerk, and at the same time transmit copies of this certificate and the accompanying memorandum opinion to counsel for the parties.

DONE this 19th day of September, 1990.

/s/ William M. Acker, Jr.
WILLIAM M. ACKER, JR.
United States District Judge

APPENDIX F

THE STATE OF ALABAMA
JUDICIAL DEPARTMENT
IN THE SUPREME COURT OF ALABAMA

October 11, 1990

89-1815

MATTHEW BEECH, a minor, who sues through his father and next friend, THOMAS L. BEECH

v.

OUTBOARD MARINE CORPORATION

CERTIFIED QUESTIONS FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA, MIDDLE DIVISION

ORDER

This Court having consented to answer the question certified by the United States District Court for the Northern District of Alabama, Middle Division.

IT IS ORDERED that the plaintiff, Matthew Beech, a minor, who sues through his father and next friend, Thomas L. Beech, shall file with the Clerk of this Court, within twenty-eight (28) days from this date, an original and nine copies of their brief, with certificate of service on opposing counsel, on the questions hereinafter stated. The defendant, Outboard Marine Corporation, shall file with the Clerk of this Court, within twenty-one (21) days

after receipt of plaintiff's brief, an original and nine copies of its brief, with certificate of service on opposing counsel. Plaintiff may file a reply brief to defendant's brief within fourteen (14) days from receipt therof.

The questions are:

1. Assuming that several witnesses for plaintiff and several witnesses for defendant, all having the threshold credentials and qualifications to be allowed to express opinions as experts on water safety and/or boat propeller design and/or the feasibility of designing a guard for a boat propeller, express differing opinions as to the feasibility and desirability of designing and marketing a propeller guard for pleasure craft which, while arguably creating other dangers, would, in fact, have protected a swimmer under certain circumstances against certain kinds of propeller injuries, can a swimmer injured under such circumstances by an unguarded propeller present a prima facie case under the Alabama Extended Manufacturers Liability Doctrine (AEMLD); or is the trial court precluded from submitting to the jury the question of whether or not a safer practical alternative design could have been or should have been made available to the consuming public?

2. Is it possible under AEMLD for an injured swimmer to present expert testimony which will make out a jury issue of product defect when the only alleged defect is the absence of a guard on a pleasure boat propeller on an outboard motor and when the only evidence offered by plaintiff is that a feasible propeller guard *could have been* designed by a proper use of the manufacturer's resources?

3. As a matter of Alabama law, is or is not a pleasure boat's unguarded propeller dangerous beyond the expectation of an ordinary consumer?

4. Assuming that several witnesses for plaintiff and several witnesses for defendant, all having the threshold credentials and qualifications to be allowed to express opinions as experts on water safety and/or boat propeller design and/or the feasibility of designing a guard for a boat propeller, express differing opinions as to the feasibility and desirability of designing and marketing a propeller guard for pleasure craft which, while arguably creating other dangers, would, in fact, have protected a swimmer under certain circumstances against certain kinds of propeller injuries, can a swimmer injured under such circumstances by an unguarded propeller present a prima facie case under a negligence theory, or is the court precluded from submitting to the jury the question of whether or not the failure to provide such a propeller guard constitutes negligence?

5. Assuming that several witnesses for plaintiff and several witnesses for defendant, all having the threshold credentials and qualifications to be allowed to express opinions as experts on water safety and/or boat propeller design and/or the feasibility of designing a guard for a boat propeller, express differing opinions as to the feasibility and desirability of designing and marketing a propeller guard for pleasure craft which, while arguably creating other dangers, would, in fact, have protected a swimmer under certain circumstances against certain kinds of propeller injuries, can a swimmer injured under such circumstances by an unguarded propeller present a prima facie case under a wantonness theory, or is the court precluded from submitting to the jury the question of whether or not the failure to provide such a propeller guard constitutes wantonness?

Hornsby, C. J., and Maddox, Jones, Shores, Adams, Houston, and Kennedy, JJ., concur.

APPENDIX G

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 90-7686

IN RE: OUTBOARD MARINE CORPORATION,
Petitioner.

On Petition for Writ of Mandamus to the
United States District Court
for the Northern District of Alabama

[Filed Oct. 29, 1990]

BEFORE: FAY, COX and BIRCH, Circuit Judges.

BY THE COURT:

The petition for writ of mandamus is DENIED.

Respondent Beech's motion to dismiss petition for writ of mandamus as moot is DENIED.